Supreme Court, U.S.
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No. 94-1734

In The

Supreme Court of the United States

OCTOBER TERM, 1995

LANSING DAIRY, INC., *et al.*,

Petitioners,

v.

DAN GLICKMAN, *et al.*,
SECRETARY OF AGRICULTURE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The court of appeals rejected as "not credible" the government's contention that the agency did not depart from its longstanding interpretation of an important statutory provision. Pet. App. 30a. The court of appeals nevertheless accorded full deference to the agency's current interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the ground that the agency's failure to acknowledge or explain its departure is "irrelevant" as long as the new interpretation is otherwise "reasonable." Pet. App. 31a. Further review is warranted because the court of appeals has decided an important question under the *Chevron* doctrine in a way that conflicts with decisions of this Court and other courts of appeals.[1]

1. a. The government contends (U.S. Br. in Opp. 9-13) that the agency has not changed its interpretation of the statute. That fact-bound contention was rejected by both courts below, as well as by the agency's own ALJ. See Pet. App. 30a, 55a-57a, 252a. This Court generally does not revisit factual determinations where both courts below are in accord. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

The government attempts to avoid this rule by asserting that the district court "did not squarely hold that [the agency's] interpretation had changed." U.S. Br. in Opp. 10. That assertion reflects either wishful thinking or a highly

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[1] Respondents do not dispute the importance of the question presented. Nor do they dispute the practical significance of the underlying statutory question in this case, which concerns the agency's discretion to set minimum prices for more than 100 billion pounds of raw milk each year. See Pet. 9.

selective reading of the district court's opinion. The district court noted that the definition of "minimum price" in an agency publication "necessarily assumes that location adjustments are part of the minimum price," and that "[t]he Secretary, through his Judicial Officer, has even more overtly acknowledged that he has a duty to comply with section 608c(18) when promulgating location adjustments." Pet. App. 55a. The district court also found that the agency had presented "absolutely no evidence" to support its position, and that the Judicial Officer's prior decision in *In re Borden*, 46 Agric. Dec. 1315 (1987), aff'd, No. H-88-1863 (S.D. Tex. 1990), "clearly indicates that location adjustments are governed by the provisions of section 608c(18)." Pet. App. 56a. The court of appeals had no difficulty recognizing that "[t]he district court determined that the Secretary's prior interpretations of §§ 608c(5) and 608c(18) explicitly recognized the fact that the Secretary's ability to promulgate location adjustments was restricted by § 608c(18)." Pet. App. 28a. See also *id.* at 27a (district court "found . . . that the Secretary's 'new' interpretation . . . reverses a longstanding agency policy.") The government's effort to read the district court's opinion as saying something other than what it clearly says is indefensible.

In any event, the agency's contention that it has not changed its interpretation is no more credible in this Court than it was in the courts below. According to the government, "[p]etitioners cited statements in *Borden* indicating that, in prescribing location adjustments under Section 608c(5), the Secretary *may* consider the adequacy of the milk supply in a marketing area, which is one of the economic factors that the Secretary is required to consider in Section 608c(18)." U.S. Br. in Opp. 11 (emphasis added). In fact, *Borden* states that § 608c(18) "*requires* the Secretary to set milk prices, *including location adjustments*, at a level that will, by themselves, 'insure' a sufficient quantity of

milk." 46 Agric. Dec. at 1459-60 (emphasis added); see also *id.* at 1461 ("Secretary is *required* by [§ 608c(18)] to make certain that the Class prices *and location adjustments* in every milk order are high enough to attract milk to every part of a marketing area") (emphasis added).[2]

b. i. The government next argues (U.S. Br. in Opp. 13-18) that an agency's current interpretation of a statute that it administers is entitled to *Chevron* deference even if the agency has abandoned a prior longstanding interpretation without acknowledging or explaining the reasons for its action. The government thus agrees with the court of appeals that cases such as *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), have no application in the *Chevron* setting. But the government's endorsement of the court of appeals' decision cannot alter the fact that four other courts of appeals have held that the *State Farm* principle applies at stage two of the *Chevron* analysis. See Pet. 10-11 (citing cases from D.C., Third, Ninth, and Tenth Circuits). Indeed, this Court applied that principle in *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991). And in *Chevron* itself, the Court held that agency interpretations of ambiguous statutory language are "given controlling weight *unless they are arbitrary, capricious*, or manifestly contrary to the statute." 467 U.S. at 844 (emphasis added). See *State Farm*, 463 U.S.

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[2] See also Pet. App. 28a (agency publication "necessarily assumes that location adjustments are part of the minimum price"); *id.* at 30a (agency brief in a prior case acknowledged that locations adjustments are "governed by" § 608c(18)); 30 Fed. Reg. 7903, 7905 (1965) (agency rulemaking decision acknowledged that location adjustments are part of the "minimum price structure").

at 41-42 (agency's failure to supply a reasoned analysis for change is arbitrary and capricious).[3]

The government urges the Court to ignore the court of appeals decisions cited in the petition because the government ended up winning all but one of the cases, and lost the remaining case on multiple grounds. See U.S. Br. in Opp. 17. But the relevant question, for purposes of determining whether a circuit conflict exists, is whether a question of federal law has been decided differently by different circuits. See S. Ct. R. 10.1. The government does not dispute that whether the *State Farm* principle applies in the *Chevron* context is a federal question, or that four other courts of appeals have decided that question differently from the court of appeals in this case.

On the merits, respondents fail to address petitioners' basic argument that the *State Farm* principle dovetails with the basis for *Chevron* deference, *i.e.*, recognition that interpretation of ambiguous statutory language is "often more a question of policy than of law," *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991). See Pet. 12-13. The government argues (U.S. Br. in Opp. 16) that "[p]etitioners have pointed to no statement of the Secretary's rationales for

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[3] Respondents rely (U.S. Br. in Opp. 14; PEC Br. in Opp. 7-8) on this Court's recent statement in *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995), that "any change in the Comptroller's position might reduce, but would not eliminate, the deference we owe his reasoned determinations." That statement plainly does not excuse the agency from acknowledging and explaining a change of interpretation. Indeed, the requirement of "*reasoned* determinations" suggests the contrary. The other decisions of this Court cited at p. 14 of the government's brief (including a dissenting opinion and a decision that pre-dates *Chevron* by several years) simply do not address the question presented in this case.

the interpretation that . . . he previously adopted," and that "the Secretary cannot be expected to explain why he no longer subscribes to rationales to which he never subscribed in the first place." But the need to acknowledge and explain — *i.e.*, deliberately abandon — a prior agency interpretation arises without regard to whether the rationale for the prior interpretation was stated (although agencies often provide such explanations). And in any event, the agency is not required to invent, and then reject, rationales "to which it never subscribed"; the agency is simply required to provide a reasoned explanation for the change, *i.e.*, to explain why the new interpretation is more reasonable than the prior interpretation, in terms of principles of statutory construction, policy goals, or regulatory context. *Chevron*, 467 U.S. at 845, 858-59.

The government fails to acknowledge the startling implications of its position. Under the government's view, agencies are entitled to switch from one "reasonable" interpretation of a statute to another without acknowledging or explaining what they are doing — and, indeed, are entitled to switch repeatedly among two or more "reasonable" interpretations to achieve the result they are seeking in a particular case. If courts are powerless to withhold *Chevron* deference in the face of such arbitrary and capricious action, the *Chevron* doctrine will be transformed from a rule of judicial deference to agency policymaking into a rule of judicial abdication to lawless agency behavior.[4]

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[4] In a footnote, the government makes the ambiguous concession that "if an agency has changed its interpretation of an ambiguous statutory provision, its explanation for the change may well assist the court in assessing the reasonableness of the new interpretation under step two of the *Chevron* analysis." U.S. Br. in Opp. 15 n.12. At a minimum, this suggests that the court of appeals erred in dismissing the agency's unexplained departure from its prior interpretation as "irrelevant." Pet.

ii. The government's final contention (U.S. Br. in Opp. 18-21) is that the agency provided the requisite explanation for its change of position in this case. That contention is plainly incorrect. First, the agency did not acknowledge that it was changing position. Other courts of appeals require an agency both to acknowledge *and* explain a change of interpretation as a prerequisite for *Chevron* deference. *Seldovia Native Ass'n, Inc.* v. *Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990) (no deference unless "agency acknowledges *and* explains the departure from its prior views") (internal citation omitted); *Mobil Oil Corp.* v. *EPA*, 871 F.2d 149, 154 (D.C. Cir. 1989) (agency "acknowledged . . . change" *and* "cogently explained reasons for it") (emphasis added). The requirement of an acknowledgement ensures "that prior policies and standards are being deliberately changed, not casually ignored." 871 F.2d at 152 n.5 (quoting *Greater Boston Television* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).[5]

In addition, the government's argument confuses an agency's statement of its current statutory interpretation with its explanation of the decision to abandon a prior interpretation. "The agency will be required to show not only that its new policy is reasonable, but also to provide a

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App. 31a. To the extent the government concedes that an inadequate explanation of a change may render an otherwise reasonable interpretation unreasonable for *Chevron* purposes, it concedes the entire issue.

[5] Outside the *Chevron* context, acknowledgement of the change is an established element of the *State Farm* requirement. See, *e.g.*, *Busboom Grain Co.* v. *ICC*, 856 F.2d 790, 796 (7th Cir. 1988) (agency "must acknowledge and give reasons for the change"); see also *Telecommunications Research & Action Ctr.* v. *FCC*, 26 F.3d 185, 193 (D.C. Cir. 1994); *Panhandle Producers & Royalty Owners Ass'n* v. *Economic Regulatory Admin.*, 847 F.2d 1168, 1176 (5th Cir. 1988).

reasonable rationale supporting its departure from prior practice." *Seldovia*, 904 F.2d at 1345; see also *Exxon Corp.* v. *Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992); *Borden*, 46 Agric. Dec. at 1378 ("heavier burden" imposed when agency is "'changing its course'") (quoting *State Farm*, 463 U.S. at 42). The old interpretation may (or may not) be more reasonable than the new one, judged by principles of statutory construction or the agency's policy goals. See *Chevron*, 467 U.S. at 843 n.11 (court "need not conclude that the agency construction [is] . . . the reading that court would have reached if the question initially had arisen in a judicial proceeding"). In addition, parties may have relied on the old interpretation in ways that counsel against a switch. Consequently, the explanation offered in support of a change must include some type of comparative analysis. In this case, the agency steadfastly denied that it was departing from its prior interpretation, and thus had no occasion to engage in a comparative analysis.[6]

iii. Respondent PEC contends (PEC Br. in Opp. 10-18) that the court of appeals should have decided this case in the government's favor at stage one of the *Chevron* analysis. The government does not make this argument, the court of appeals rejected it, see Pet. App. 23a, and the district court decided the case *in petitioners' favor* at stage one of the *Chevron* analysis, see Pet. App. 53a-55a. PEC's argument is misguided. Although there are strong arguments that this is a "plain language" case, those arguments support petitioners, not respondents.

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[6] Because this proceeding was a formal "on the record" rulemaking, any such explanation had to be made in the rulemaking decision. See Pet. App. 172a.

The underlying statutory question in this case is whether terms in a milk marketing order that fix or modify adjustments to minimum milk prices are among the terms that "fix minimum prices to be paid to producers" or "modify[] such prices." 7 U.S.C. § 608c(18). The statutory text provides at least three reasons for answering that question in the affirmative. *First*, the ordinary meaning of "price[]" is "the sum of money or goods asked or given for something" or "the cost at which something is obtained." *Webster's II New Riverside University Dictionary* 933 (1988). It is undisputed that the minimum amount of money actually paid to dairy farmers for raw milk is the sum of a uniform price and the adjustments to that price. *Second*, the statutory text reinforces the ordinary meaning of "price" by providing that § 608c(18) applies to all terms that "fix minimum prices *to be paid to producers*." (Emphasis added). This further supports the conclusion that price adjustments and other terms that determine the minimum prices actually paid to producers are among the terms that fix or modify minimum prices.[7] *Third*, § 608c(5)(A) provides that minimum prices "shall be uniform . . ., *subject only to* adjustments," (emphasis added), thus implying that adjusted (non-uniform) prices are "minimum prices." See Pet. App. 54a.[8]

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[7] The government accuses petitioners of "ignor[ing] critical statutory language." U.S. Br. in Opp. 20. In fact, it is the government that ignores the statutory language providing that §608c(18) applies to all terms that "fix minimum prices *to be paid to producers*." See, *e.g.*, U.S. Br. in Opp. 19, 20. The government ascribes to petitioners (without citation to the petition) an argument that § 608c(18) applies to terms in a milk marketing order that "affect" the price of milk. See U.S. Br. in Opp. 20. Petitioners contend that price adjustments do not merely "affect" minimum prices; they are among the terms that "fix" or "modify" such prices.

[8] Apart from the language of the statute, the district court's interpretation of the statute is also consistent with Congress's intent "to confine the boundaries of the Secretary's delegated authority" under the

2. The petition also contends (Pet. 15-18) that the court of appeals declined to draw reasonable inferences from the statutory text at stage one of the *Chevron* analysis, contrary to recent decisions of this Court such as *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994). The government's perfunctory response is that this question "does not warrant review by the Court." U.S. Br. in Opp. 21. But petitioners have not argued that this question independently merits review. In the event that the Court grants review of the first question presented, petitioners believe that it would be appropriate to grant review of the second question as well, in order to allow the Court to engage in the full *Chevron* analysis. In the event

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AMAA. *Zuber* v. *Allen*, 396 U.S. 168, 183 (1969). See Pet. 17 n.14.

The government asserts (U.S. Br. in Opp. 19-20) that the price of feeds and the available supplies of feeds are not "invariably relevant" in determining location adjustments. U.S. Br. in Opp. 20. Of course, they *may* be relevant, as the government implicitly concedes. And in any event, § 608c(18) requires that the minimum prices actually paid for milk — including price adjustments — reflect an analysis of "economic conditions which affect market supply and demand for milk." If the agency has already considered feed prices at an earlier stage of its analysis, it need not perform a redundant analysis. (In fact, for 20 years the agency has fixed Class I milk prices not by reference to feed cost and supply, but rather based on the need "to move milk from supply areas to demand centers." 59 Fed. Reg. 42422, 42425 (1994). Compare U.S. Br. in Opp. 4 n.4 (describing location adjustments in virtually identical terms)). Section 608c(18) provides, however, that the agency may not use location adjustments as a device to fix minimum prices that do not reflect an analysis of supply and demand.

Finally, PEC's argument concerning "parity prices" (PEC Br. in Opp. 14-18) is a red herring. The agency has not used the parity pricing methodology for decades. See 59 Fed. Reg. 42422, 42424 (1994) (additional analysis undertaken because "the parity price is not reasonable"); *Borden*, 46 Agric. Dec. at 1459-60 ("Secretary has found that parity prices are unreasonable for the last 50 years").

that the Court does not grant review of the first question, petitioners believe, for the reasons stated at pages 15-18 of the petition, that it would be appropriate to grant, vacate, and remand for further consideration by the court of appeals in the light of *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in the light of *Brown* v. *Gardner*, 115 S. Ct. 552 (1994).

Respectfully submitted.

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